JUDGE ESTEE SAYS PRIMO LICENSE LAW IS INVALID

The Mainland Beer Has the Same Rights in the Territory as the Honolulu Brew.

THE PRIMO beer license law was declared unconstitutional and void by Judge Estee yesterday, and the injunction as prayed for by the local agents of the mainland breweries, restraining Treasurer Wright from the further issuance of $250 licenses was granted.

The decision in effect means that no more license for the exclusive sale of Honolulu made beer can be issued, but whether or not it will nullify the licenses of the saloons now selling Primo beer is still an open question. The decision has been appealed from, and pending its final determination the saloons now doing business under Primo licenses may continue to operate, unless further action is taken by the plaintiffs; though the order in the case would operate to prevent a renewal of such licenses and at the outside the sale of Primo beer would terminate within six months, though according to one view every saloon keeper holding a $250 license could be prosecuted for alleged liquor selling, the license having been declared void.

The plaintiffs in this case, which was brought to test the law are: Macfarlane & Co., Ltd., agents for the Val Blatz Brewing Company of Milwaukee, and the John Wieland Brewing Company of San Francisco; H. Hackfeld & Co., Ltd., agents for the Anheuser-Busch Brewing Company of St. Louis; W. C. Peacock & Co., Ltd., agent for the Pabst Brewing Company of Milwaukee, American Brewing Company of St. Louis, and Buffalo Brewing Company of Sacramento; Ed. Hoffschlaeger & Co., Ltd., agents for the Fred Miller Brewing Company of Milwaukee; St. C. Sayers, agent for the Seattle Brewing & Malt Co.; Lawrence H. Dee, agent for the Capital Brewing Company of Olympia.

All the plaintiffs but Dee hold dealers' or wholesalers' licenses at $500, while the latter paid $1000 per year.

After reciting the facts of the complaint, and the statutes and legislative acts under which the licenses were issued, Judge Estee, in reference to the $250 licenses, said:

"But as a condition precedent to the issuance of said license, each applicant was required to execute a bond in the penal sum of $1000 conditioned among other things as follows:

"Second: That he will not sell or otherwise dispose of on the premises for which he is licensed, any wines, malt liquors or spirits of any description whatsoever except such beer manufactured in Honolulu and under said above mentioned act (the act to license the brewing of malt liquors in Honolulu). Plaintiff Exhibit 2.

"In other words, said licensees are given the privilege of selling at retail Honolulu manufactured beer under licenses which are to be paid for at the rate of $250 per annum, upon condition that they do not either store or sell upon the premises any foreign manufactured beer or other spirits.

"From the testimony of the defendant, W. H. Wright, it appears that 25 of these licenses were issued between July 1, 1901, and November 25, 1901, and the testimony further shows that certain of the licensees are doing business thereunder."

The demand made upon the Treasurer by the plaintiffs for $250 licenses and his refusal to issue them is set out, and the court says:

"No licenses as demanded were ever issued to the complainants or any one of them, as in the language of the defendant in his answer on file herein, 'in the exercise of the discretion vested in him, he refused to issue the licenses hereinabove requested and still refuses to issue the same.'

"While the real issue in this case is whether chapter 46 of the Session Laws of 1888 (now part V, chapter 41 of 'The Penal Laws of the Hawaiian Islands, 1897,') is unconstitutional and void by reason of its discrimination against the beer products of the other States and Territories of the United States, yet the jurisdiction of the court on other grounds has been assailed upon the hearing, although no plea thereto was raised by defendant's answer.

"In the matter of jurisdiction two questions are to be considered by the court:

"First: Is there a constitutional question involved in the case? and Second: Do the facts in the case show an amount of injury sufficient to enable the court to assume and retain jurisdiction in accordance with the provisions of the law giving jurisdiction to Circuit Courts in certain cases?

"Section 1 of the act of 1888 Vol. 25, Statutes of the United States, p. 434) amendatory of the act of 1875, provides as follows:

"'The Circuit Courts of the United States shall have original cognizance * * * of all suits of a civil nature at common law or in equity where the matter in dispute exceeds exclusive of interest and costs the sum or value of $2000 and rising under the constitution or laws of the United States.'

"There is no doubt as to the bill of complainants showing upon its face a sufficient case for the court to take jurisdiction originally, alleging as it does both the statutory amount of injury and the fact that the Territorial statute complained of is in violation of the Constitution of the United States; and no plea having been filed on the part of the defendant to the jurisdiction. As was said by the Supreme Court of the United States in the case of Hartog vs. Memory, 116 United States 588, parties cannot call upon the court to go behind the record, 'except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed.'

"This is not an action at law. It is an application for an injunction and therefore within the equity jurisdiction of the court. The injury complained of if any be shown, is a continuing one, and it has been frequently held that in a suit in equity where an injunction is asked for, the amount in dispute is not the amount in controversy, but rather the value of the object to be gained by the bill."

After quoting several former decisions as to the question of injury, the court says:

"And while it is true that the complainants did not all establish a clear pecuniary loss, yet it is apparent that each of them was injured in his individual right to free commerce in the infringement thereof, by this discriminating statute, and in addition to this common injury sustained by all, there was, in the estimation of the court, sufficient specific pecuniary loss shown by at least two of the complainants, to-wit: Peacock & Co. and L. H. Dee, in damage to each of them by reason of the falling off of sales since the issuance of the licenses to sell the Honolulu brewed beer to meet the requirements of the statutes in relation to the amount of damage involved in a suit to give this court jurisdiction, and especially as it appears that this injury will be a continuing one, the amount of which cannot now be clearly estimated in dollars and cents.

"It would seem apparent therefore that the jurisdiction is shown by at least two of the complainants."

Referring to the question of constitutional rights, Judge Estee says:

"Under the state of facts disclosed in this case, are the complainants, while selling the beers of the different persons and corporations, citizens of other States, for whom they respectively act as agents in Honolulu on an equal footing in a free market with the manufacturers of home-brewed beer?"

The privileges conferred by the various forms of licenses are contrasted and the court concludes:

"It seems to be clear that upon the face of sections 479 to 481 inclusive, they are grossly discriminating against a foreign manufactured commodity, in this instance foreign manufactured beer. And this is made absolutely plain from the testimony of Mr. Wright, the defendant herein, who, referring to a conversation with Mr. Robertson, one of the attorneys for the complainants, in relation to the issuance of a license to them, said:

"'You informed me what you wanted and I told you that I would not issue a license under the law (act of 1888) to sell foreign beer, and you then told me that perhaps there would be a suit brought against me. * * * I refused to issue a license under that law for the sale of beer manufactured outside of Honolulu.' The court: Let us get at it. For a manufacturer of the mainland beer to sell beer in this Territory, he must pay to the Territory a thousand dollars a year, is that so? A. They must obtain a retail liquor license. Q. For a thousand dollars a year? A. Yes, sir; which permits them to sell everything. Q. But they cannot sell that imported beer unless they have one of those thousand dollar licenses? A. That is correct. Q. And they can sell home-made beer for $250 a license, is that correct? A. Yes, sir.

"In other words, any man to whom a license is issued to sell and who will give bond to sell none but Honolulu brewed beer, can do so for a license fee of $250 a year; but any man who desires to sell imported beers at retail must take out a retailer's license and pay $1000 a year, or exactly four times the amount he would have to pay to sell home-brewed beer alone, and while paying this $1000 a year, is not even then permitted to sell the Honolulu commodity thereunder.

"Clear discrimination is shown as against the manufacturers of the foreign commodity, for which they have a right through their agents to complain, and the fact that the $1000 license also covers the sale of spirituous liquors other than beer is a mere incident; the fact remains that the imported beers cannot be sold except upon a license costing four times the amount of the license to sell the home brewed beer. Such a discrimination is repugnant to the constitution of the United States, and clearly in violation of its provision hereinbefore set forth.

"It is true that under the police powers of a State or Territory, it can regulate the sale of all intoxicating liquors within its bounds, or prohibit such sale entirely, but in doing so it cannot discriminate against the stranger within its gates. The local laws of this Territory, far from prohibiting the sale of spirituous liquors herein, directly contemplate the continuance of the liquor traffic, and derive a revenue therefrom by licensing it. Nothing is better settled, however, than that a State cannot constitutionally enact laws discriminating in favor of its own citizens or in favor or against the citizens of any other State of the United States. On this rests one of the most sacred rights of citizenship. If the laws of one State or Territory can discriminate against the property rights of the citizens of another State or Territory in one thing, they can do so in all things. It would hardly seem necessary to refer to authorities sustaining this proposition. [illegible] it was held by the Supreme Court of the United States in the case of Walling vs. Michigan, 116 United States 446, which is a case in relation to the constitutionality of a statute imposing a tax on persons engaged in the sale of liquors to be brought into and sold within the State.

"A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State is in effect, a regulation in restraint of commerce among the States and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.'

"I am therefore of the opinion that chapter 46 of the Session Laws of 1888 now known as Part V of chapter 41 of the Penal Laws of the Hawaiian Islands, 1897,' entitled 'Sale of Malt Liquors,' is unconstitutional and void. Let the injunction issue as prayed for.

"ESTEE, Judge."

NO MORE CHEAP LICENSES.

There is considerable difference of opinion as to just what effect the decision of Judge Estee will have on the local saloon situation. One thing is certain, no more licenses to sell Primo beer at $250 a year will be issued by Treasurer Wright, as he is particularly enjoined from so doing.

The vital question is as to the status of the present saloons under the licenses which the court has declared unconstitutional. Neither Treasurer Wright nor Attorney-General Dole would say yesterday just what steps would be taken in the matter, but for the present, at least, the saloons will be allowed to run. The question of what is to become of the license money already paid is also a delicate one. Each of these twenty-five saloon licenses means $250 to the public treasury, and if the licenses are of no effect then part at least of the fee would have to be refunded. Speaking of the matter yesterday J. J. Dunne, who was attorney for the plaintiffs in the case, said: "The order of the court declares that the law is unconstitutional, and I am of the opinion that the licenses fall with the law. Every man selling Primo beer today is violating the liquor laws, for he is doing it without a license, and could be prosecuted. The license is of no value whatever, as all acts by virtue of an unconstitutional law can be of no effect. What further action will be taken by the plaintiffs has not been definitely decided, and cannot be until this appeal question is settled."

Mr. Dunne did not believe that the appeal would act as a stay of execution, but was not prepared to state exactly what course would be pursued in reference to the saloonmen already operating under the license laws, which had been declared unconstitutional. The saloons holding these beer licenses are outside of the limits, and a full liquor license could not be given them, even though the Honolulu Brewing Co. would be willing to put up the balance to make up the $1000 which other dealers must pay. It is likely also that the act will be amended by the next Legislature so as to allow all saloons handling only beer, foreign or domestic, to come within the $250 limit. In the mean time there will hardly be any prosecutions by the Territory against those holding the licenses which have been declared to be invalid. The matter will probably be finally settled at a conference today between Treasurer Wright and Attorney-General Dole.

PUBLIC OPINION.

Saloon men were generally on the qui vive yesterday when the news reached them of Judge Estee's decision with reference to the unconstitutionality of the saloon licenses which have been issued by Treasurer Wright for the sale of Primo beer. That the Honolulu Brewing and Malting Company was hard hit, as far as the decision in itself was concerned, was generally conceded, but most of those interested in the brewery side of the question were optimistic as to the outcome. They are of the opinion that even if the higher United States court to which the case has been appealed, sustains Judge Estee's decision, it will mean that there will be an entire readjustment of the law concerning the issuance of saloon licenses, and they therefore feel that the large amount of capital which they have invested in the islands will practically be unmolested in the end.

The members of the Anti-Saloon League and church organizations which have been opposing the increase in the number of beer licenses, feel that they have gained a partial victory, as, pending the decision of the higher court, the treasurer is necessarily restrained from issuing more licenses. This will give the anti-saloon people an opportunity to carry on their fight against the liquor and beer sellers without fear of being undermined by counter movements of their natural enemy.

When the proprietors of the Primo beer saloons were apprised that the United States District Court decision in the matter of licenses had gone against them, there was a shock, but this wore off when it was known that the case had been appealed, and that in case it went to Washington to the United States Supreme Court, they could continue dispensing the local brew over the counters for an indefinite period.

Judge Silliman, who defended the brewery's interests, said that the case as it stood virtually put a quietus on the Honolulu Brewery. He was of the opinion that the local industry had been given a serious blow, but he felt that the decision would not be sustained by the United States Circuit Court, to which the case has been appealed. He was of the opinion that it would be a question of a year's time before the Supreme Court decided upon the matter, if the question was carried that far. It was a test case, and the entire saloon license system depended upon the result. He expressed the opinion also that Judge Estee had no jurisdiction in the matter.

The probabilities are that the interests affected by the decision will plan for legislation when the next Territorial Legislature meets, to enact a new license law.

The Catholic Mission Band assembled last evening in the Mission rooms and presented Father Valentin, the band leader, with a handsome silver-mounted baton, in recognition of his valuable services.

JAP HELD TO BE INSANE

Jury Acquits Him of Crime of Murder.

Furuki Kasabro was acquitted yesterday of murder, on the ground of insanity. The insanity plea, said to be the first ever made in the Territory, was effective, but the verdict of acquittal will not release the Japanese child murderer from all responsibility for the crime, and he is now turned over to the Governor for further action, though he will probably be sent to Japan in the end. The trial yesterday abounded in interesting features, not the least of which was the statement made by the prisoner in his own behalf. He admitted guilt, but claimed that he did not know what he was doing.

The prosecution closed, at the opening of court yesterday morning, and Mr. McClanahan began his defense, depending entirely upon the plea of insanity, the defendant admitting the crime. The morning witnesses were several Japs who had known the defendant, and one of them testified that Kasabro was a reader of Japanese novels, and that it appeared to affect his mind so that he would often cry and become angry. J. R. Higby testified that the defendant had been stableman at the American Sugar Company plantation some time ago, and was subject to many peculiar eccentricities. On one occasion he refused to allow hay to be taken from the stables, saying that there would not be enough for his horses, though at the time there was enough hay in the barn to supply the stock for three months. C. H. Center, Mrs. Carter and others testified also as to peculiarities of the defendant. The wife of Kasabro was put on in the afternoon, and she testified also to some of the strange things he was in the habit of doing.

The most interesting witness of the day was the defendant, who told in detail the story of his crime. He said that he had taken his child upon the mountain as usual while he cut wood, and while there thought how useless he was, with a paralyzed arm, and that the baby would always be only a source of expense. After that he remembered nothing until he found himself standing under a tree and felt pains about his neck. Overhead hung a rope with a broken loop, and at his side lay the child—dead. "The child's death surprised me," said the defendant through the Japanese interpreter; "I lost myself thinking, for I did not want to live either. Then I heard voices, a distant voice, calling 'Papa! Papa!' which I recognized as the voice of my dead child. I turned back and could see the vision of a good many people walking in the woods, but they were not real men. After leaving the mountain I went to Palama, and this time I turned and could see plainly, real men, and feel the weight of my child upon my back, and still thinking about it, I delivered myself at the police station." The witness said he had often heard the voices before, in Japan and in this country.

"Are you fond of reading?" asked Mr. McClanahan.

"I like to read magazines and novels; when I come to something sorrowful I would be agitated; if I read books and they are unintelligible, I become angry and tear them up."

"Do you not think you should be punished for this crime?" The court ruled out the question, and the witness was excused.

Dr. Wood was next called to testify to the defendant's sanity. He said that from what he had heard, coupled with the commission of the crime, he was convinced that the man was insane. The doctor was of the opinion that the fact of the insanity of defendant's father was another corroborative point, as physicians all over the world believed thoroughly that insanity was hereditary. The witness then started to tell of his visit to Japan and the examination of medical schools there, there having been no insane asylums, when Judge Gear interrupted him with:

"Was that the time W. O. Smith was along?"

"It was," answered the witness.

"Do you want to make an objection," continued the court, turning to the prosecuting attorney, and Mr. Douthitt interposed an objection on the ground that the evidence was not material, which Judge Gear sustained. Dr. Wood said that the strongest human emotion was the parent love, and to overcome this there must be some strong reason, and if no such reason is given, an act such as murder could be accounted for on no other theory than that of insanity. Such a crime was always classed by physicians as among the unnatural crimes, which is also evidence of insanity. Mr. Douthitt asked on cross-examination if infanticide was not practiced in India, and witness replied that it was, but did not think that the necessary conclusion was that it is due to insanity, but rather to custom. On examination by Judge Gear, Dr. Wood testified that the act itself was one of his chief grounds for saying that the defendant was insane.

Following this the attorneys argued the case briefly, and the court instructed the jury, dealing only with the question of insanity. Within fifteen minutes a verdict of acquittal was returned. Accompanying this verdict was a second finding that verdict was returned because of the belief of the jury that defendant was insane at the time of the commission of the crime. Judge Gear then ordered the defendant to the custody of Dr. Mori, of the Japanese Charity Hospital to await action by the Governor, who may send him to the insane asylum, or make any disposition he sees fit under the local statutes. Arrangements are being made, however, to send Kasabro to Japan on the next steamer. He has been very much dejected during the entire trial, and evidently feels his position keenly. During his examination yesterday he broke down several time, and wept bitterly as he retold the story of his child's death.

BEFORE HUMPHREYS.

In Judge Humphreys' court yesterday the case of Helen A. Holt et al. vs. Andrew Cox et al., was concluded, and after a half hour's deliberation the jury returned a verdict in favor of plaintiff, awarding her the land in question. W. O. Smith and R. D. Mead appeared for plaintiff. During the argument F. E. Thompson sat for a while as judge. Humphreys having urgent business [illegible].

COURT NOTES.

Action has been filed by the Territory in the suit of Cecil Brown vs estates [illegible] Gear.

W. G. Smith has been appointed administrator of the estate of James R. Judd.

Judge Humphreys yesterday refused to allow an appeal to Mrs. Jessie Hollowell from his order allowing C. A. Brown to see her children. He gives his reasons on the appeal as follows:

"The within appeal is hereby disallowed for the reason that the First Judge was not called upon to make and did not make any order in said matter. He was asked to require the guardian to show cause why Judge Gear's order had not been obeyed, and, no sufficient cause being shown, the guardian was held to be in contempt. No punishment was inflicted, the First Judge merely holding that Judge Gear's order would be enforced and further, fixing the date of its operation. If the appeal were taken from the alleged order of the First Judge, Judge Gear's order, which was entered by consent of at parties, would still be in force, and the Court would enforce by every means."

CAPTURING THE PACIFIC

Concerning the proposal of the Oceanic Steamship Company to institute a fortnightly service, carrying mails between Sydney and San Francisco in eighteen days, the Otago Witness says:

The United States government is becoming increasingly alive to the growing commercial importance of the islands of the Pacific, and the mail service proposals of the Oceanic Steamship Company are evidently part of a carefully prepared program with the end in view of capturing the Pacific island trade. The idea of a fortnightly service, carrying mails from Sydney to San Francisco in eighteen days, is no doubt alluring, especially in these days when so much is sacrificed for speed; but there are other considerations of greater importance. It is a bad policy for any one part of the empire to consent to subsidize a foreign fleet, and thus add to the disadvantage under which Great Britain's merchantmen already have to compete with the ships of other nations. Did Australia need a potent argument against entertaining the American proposals she would find it in the present unsatisfactory condition of her own coastal trade. The Australian steamship service is becoming more and more unprofitable, largely owing to the heavily subsidized French and German liners, which ply along her coasts and keep freights and fares down to the lowest payable point. The encouragement of the Oceanic Steamship Company's proposals would certainly mean the introduction of another element of the same disturbing kind.

President Schwab emphatically denies all stories of his gambling at Monte Carlo, or that he intends to resign from the steel trust.

MORTGAGEE'S NOTICE OF INTENTION TO FORECLOSE.

NOTICE IS HEREBY GIVEN THAT by virtue of a power of sale contained in that certain mortgage dated the 18th day of June, 1901, made by E. C. Hornef, of Honolulu, Island of Oahu, Territory of Hawaii, to Kenahu Brenig (widow), and of record in liber 220, on pages 363 and 364, the said Kenahu Brenig intends to foreclose said mortgage for a breach of the conditions in said mortgage contained, to wit, the non-payment of the interest when due.

Notice is also hereby given that all and singular the lands, tenements and hereditaments in said mortgage described, will be sold at public auction at the auction room of Will E. Fisher, on the corner of Merchant and Alakea streets, in Honolulu aforesaid, on Saturday, the 15th day of March, 1902, at 12 o'clock noon of that day.

The property covered by said mortgage are those certain lots situate at Kapahulu, Waikiki, Oahu, and more particularly known and designated as lots Nos. 11, 13 and 14, block No. 36, upon a map or diagram of the Kaimuki tract, duly recorded in the Registry of Conveyances, Oahu, in liber 178, on folio 294, containing an area of 45,000 square feet, more or less.

Terms—Cash, United States gold coin. Deeds at the expense of purchaser. Dated Honolulu, February 13, 1902.

KENAHU BRENIG.

For further particulars, inquire of Cecil Brown.

2359—Feb. 14, 21, 28; March 7, 14.

MORTGAGEE'S NOTICE OF INTENTION TO FORECLOSE.

NOTICE IS HEREBY GIVEN THAT by virtue of a power of sale contained in that certain mortgage dated the 25th day of February, 1901, made by William Henry and Kaipo (w.) his wife, of Honolulu, Island of Oahu, Territory of Hawaii, to Charles Notley Sr., and of record in liber 221, on pages 39 to 41, the said Charles Notley Sr. intends to foreclose said mortgage for breach of the conditions in said mortgage contained, to wit, the non-payment of the interest when due.

Notice is also hereby given that all and singular the lands, tenements and hereditaments in said mortgage described, will be sold at public auction at the auction room of Will E. Fisher, on the corner of Merchant and Alakea streets, in Honolulu aforesaid, on Saturday, the 15th day of March, 1902, at 12 o'clock noon of that day.

The property covered by said mortgage is all that certain piece or parcel of land situate on a lane running off the northeast side of Vineyard street, at Kauluwela, in said Honolulu, and bounded and described as follows:

E hoomaka ana ma ke kihi Hik. o kela he 149 5-12 Kap. mai ke kihi Hema mai o ko Kamakau aina a e holo ana Hema 27 30 Kom. 108 Kap. ma ko Kalauuwalu:

Ak. 57 Kom. 85 Kap. ma Kamakela.

Ak. 50 30 Hik. 136 Kap. ma Kamakela.

Hem. 37 Hik. 91 Kap. a hiki i kahi i hoomaka'i. He 24-100 Eka.

Being a portion of apana 1 of Royal Patent 2101, Land Commission Award 794, to Naihe, and the same premises that were conveyed to said mortgagors by the members of the board of trustees of the Protestant Church of Kaumakapili by deed dated April 27, 1893, of record in liber 155, folios 59-60.

Terms—Cash, United States gold coin. Deeds at the expense of purchaser. Dated Honolulu, February 13, 1902.

CHARLES NOTLEY SR.

For further particulars, inquire of Cecil Brown.

2359—Feb. 14, 21, 28; March 7, 14.

EXECUTIVE COUNCIL.

Professor Koebele Reports on the Lantana Blight.

At yesterday's meeting of the Executive Council Entomologist Koebele made a brief report upon the effect of the lantana blight on Maui. The blight is killing off considerable of the obnoxious lantana, and there had been some talk of introducing the blight to other islands. No action was taken upon the matter.

The application of C. Baddecke for a change in location of his saloon to the waterfront at Hilo was referred to the Treasurer Wright.

William Heeb was granted a renewal of his liquor license at Hamakua.

Applications for land leases in North Kona district, Hawaii, were considered, but no action taken upon them.